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Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

No. 89-6126

RAY CHARLES DEGRAFFENREID,

PETITIONER,

vs.

KENNETH D. MCKELLER, WARDEN, KCI, WILLIAM D. LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, T. TRAVIS MEDLOCK, ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA,

RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER THE COURT OF APPEALS AND THE DISTRICT COURT PROPERLY CONCLUDED THAT PETITIONER HAD THE BURDEN OF PROVING THE ALLEGATIONS CONTAINED IN HIS HABEAS CORPUS PETITION. (PETITIONER'S QUESTION I).

II.

WHETHER THE COURT OF APPEALS AND THE DISTRICT COURT PROPERLY CONCLUDED THAT PETITIONER'S CONFESSION TO LAW ENFORCMENT OFFICIALS WAS THE PRODUCT OF PETITIONER'S INDEPENDENT, INFORMED CHOICE TO COOPERATE WITH LAW ENFORCEMENT OFFICERS AND THAT PETITIONER POSSESSED THE CAPABILITY TO MAKE SAID DECISION AND THAT HIS WILL WAS NOT OVERBORNE BY THE CONDITIONS OF CONFINEMENT OR METHODS OF INTERROGATION. (PETITIONER'S QUESTION II).

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IN THE SUPREME COURT
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No. 89-6126

RAY CHARLES DEGRAFFENREID,

PETITIONER,

vs

KENNETH D. MCKELLER, WARDEN, KCI, WILLIAM D. LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, T. TRAVIS MEDLOCK, ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA,

RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Respondents hereby make a Brief in Opposition to the Petition for Certiorari and request that the Petition be denied.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is styled as Degraffenreid v. McKellar, No. 88-6590 (4th Cir. August 9, 1989), and reprinted in the Petitioner's Appendix at A-1. The opinion of the Honorable Joe F. Anderson, Jr., United States District Judge, is reprinted in the Appendix at A-16.

JURISDICTION

The panel decision of the Fourth Circuit was entered on August 18, 1989. A Petition for Rehearing and Suggestion for Rehearing En Banc was entered on October 2,

1989. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner contends these proceedings involve the Fifth and Fourteenth Amendments to the United States Constitution.

COUNTER-STATEMENT OF THE CASE

This matter arises from the certiorari petition by Ray Charles Degraffenreid from the denial of a Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, by the Honorable Joe F. Anderson, Jr., United States District Judge for South Carolina, and its subsequent affirmance by the Court of Appeals. The Petitioner, Ray Charles Degraffenreid, is presently serving a life sentence for murder. The District Court, in its Order of March 2, 1988, rejected the Report and Recommendation of Magistrate Robert S. Carr and denied and dismissed the Petition for Habeas Corpus. The United States Court of Appeals for the Fourth Circuit affirmed the judgment of the lower court concluding that Degraffenreid in the habeas proceeding "did not meet his burden of establishing that his confinement, the nature of the questioning, or his personal characteristics -- or any combination of these factors -- rendered his confession involuntary." (A-5).

Petitioner was indicted at the May 1977 term of the Court of General Sessions for Chester County for murder. On November 5, 1977, the Petitioner proceeded to trial by

jury, was found guilty of murder, and was sentenced by the Honorable Joseph R. Moss, presiding judge, to confinement for life.

The Petitioner made a timely appeal to the South Carolina Supreme Court. He raised the following issues on direct appeal:

> 1. Did the Court err in failing to suppress the admission of the statement taken by the police from Petitioner on February 3, 1977, while in custody, under mental duress, suffering from physical pain caused by a hemorrhoid condition and after the police failed to provide Petitioner with his medication upon request?
>
> 2. Did the Court err in failing to suppress the admission of the statement taken by police from Petitioner on February 3, 1977, after Petitioner requested an attorney?

After full briefing, the South Carolina Supreme Court affirmed the conviction on January 15, 1979 pursuant to its Rule 23 of the Rules of the South Carolina Supreme Court. State v. Degraffenreid, Memo. Op. No. 79-10 (Filed January 15, 1979). Petitioner also filed Applications for Post-Conviction Relief dated January 3, 1980, and December 3, 1980. The Petitioner contended that he was being held in custody unlawfully for the following reasons:

> 1. He was denied effective assistance of counsel in that counsel failed to challenge the confession;
>
> 2. The grand and petit jury were improperly constituted in that blacks were excluded;
>
> 3. He was interrogated without having been given his Miranda warnings;

> 4. The evidence against him was obtained in violation of his constitutional rights;
>
> 5. He was denied due process in that he was a victim of malfeasance of the Sheriff during his pre-trial detention; and
>
> 6. He was denied medical treatment during pre-trial detention.

An evidentiary hearing concerning the post-conviction relief claims was held on April 28, 1981, Following the evidentiary hearing in the state court, the Honorable Donald A. Fanning, issued a written Order dated July 6, 1981, denying the Appellant's Application for Post-Conviction Relief.

Petitioner filed a timely Notice of Intent to Appeal and an appeal was perfected to the South Carolina Supreme Court. Pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), appellate counsel for Petitioner, Kathy D. Lindsay, submitted a brief on behalf of Petitioner. The South Carolina Supreme Court ruled, after a careful consideration of the record and brief, that no reversible error of law was present and it affirmed the findings and judgments of the lower court without a full written opinion, pursuant to Rule 23 of the Rules of Practice of the South Carolina Supreme Court. Degraffenreid v. State, Memo. Op. No. 82-MO-237, filed August 3, 1982. The Appellant presented the following question on appeal to the South Carolina Supreme Court:

> Did the lower court err in denying and dismissing Appellant's Application for Post-Conviction Relief when the record

> indicates Appellant received ineffective assistance of counsel pursuant to his 1977 conviction of murder; the error being that the denial of effective representation of counsel violates Appellant's constitutional rights under the Sixth and Fourteenth Amendments of the United States Constitution.

On December 17, 1985, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court. Respondents made Return on July 29, 1986. Respondents also made Amended Return on May 7, 1986.

An evidentiary hearing was held before the Honorable Robert S. Carr, United States Magistrate, on February 19, 1987. By Report dated August 5, 1987, Robert S. Carr, United States Magistrate, again recommended that Petitioner's Petition for Writ of Habeas Corpus Relief be granted unless the Respondents take steps to retry Appellant within a reasonable period of time. Respondents filed objections to said Report and Recommendation. After reviewing the record in the case and hearing oral argument from counsel for both parties, the Honorable Joe F. Anderson, Jr., United States District Judge, rejected the Magistrate's Recommendation and denied and dismissed the action. Appellant thereafter filed Notice of Intention to Appeal which resulted in the decision of the Fourth Circuit affirming the judgment of the District Court.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The lower courts properly concluded that the burden of showing a lack of voluntariness in the confession rested with Petitioner in a habeas corpus proceeding.

Petitioner asserts that the lower courts erred in incorrectly allocating the burden of proof to Petitioner to show that confession given by him was involuntary. Petitioner maintains that he bears the burden of proof with regard only to factual issues entitled to a presumption of correctness in a federal habeas proceeding. He asserts that in questions of law or mixed questions of law and fact, the reviewing court must make an independent determination as to voluntariness, thereby placing the burden upon the prosecution to show voluntariness of the confession. He asserts that the burden of proof is upon the State to prove that voluntariness by a preponderance of the evidence and that the lower courts erred in failing to apply these standards.

Respondents submit that there is a distinction in the allocation of burden of proof between cases presented on direct appeal and those presented for collateral review. In those instances in which a prisoner attempts to collaterally attack the conviction and sentence by way of habeas corpus review, the burden of proof lies with the habeas Petitioner. Bruce v. Estelle, 536 F.2d 1051 (5th Cir. 1976). See U.S. v. Sledge, 546 F.2d 1120 (4th Cir. 1977). (In direct appeal process, burden allocated to prosecution). See also

Miller v. Fenton, 796 F.2d 598 (3rd Cir. 1986); Clayton v. Hughes, 517 F.2d 577 (4th Cir. 1975); Vanter v. Boles, 377 F.2d 898 (4th Cir. 1967). See also: Machado v. Commanding Officer, 860 F.2d 542 (2nd Cir. 1988); Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980); Lokos v. Capps, 528 F.2d 576 (5th Cir. 1976).

> Although at trial, the prosecution must establish, by a preponderance of the evidence, that a challenged confession was voluntary, See Lego v. Twomey, 404 U.S. 477 (1972), on collateral review the burden of proving involuntariness rests with the habeas corpus applicant.

Martin v. Wainwright, 770 F.2d 918, at 925 (11th Cir. 1985). See also Johnson v. Zerbst, 304 U.S. 548 at 468 (1938). See also WEST'S FEDERAL PRACTICE DIGEST THIRD, Habeas Corpus, Key 85.2(1).

Petitioner asserts that cases cited by the District Court as authority for allocation of burden of proof to him were cases decided prior to the United States Supreme Court's decision of Miller v. Fenton, 106 S.Ct. 445 (1985), in which that Court announced the requirement that an independent federal determination apply in considering the voluntariness of a confession. However, Respondents submit that the United States Supreme Court decision of Miller v. Fenton, supra, did not address the allocation of burden of proof. However, on remand in Miller v. Fenton from the United States Supreme Court, the Third Circuit Court of Appeals allocated the burden of proof to the habeas Petitioner. That Court noted that at the trial level the

burden of proof is upon the government to establish by a preponderance of the evidence that the challenged confession was voluntary but that on collateral review the habeas corpus petitioner must prove involuntariness by a preponderance of the evidence. Miller v. Fenton, 796 F.2d 598 (3rd Cir. 1986). The United States Supreme Court has since denied certiorari. Miller v. Fenton, 107 S.Ct. 585. Respondents submit that the District Court and the Court of Appeals properly allocated the burden of proof in this habeas corpus action. The District Court's ability to make an independent determination of the ultimate issue of voluntariness does not effect the party bearing the burden of proof in a habeas action.

Contrary to the characterization of the Petitioner, the District Court and Court of Appeals merely recognized that in a collateral proceeding the burden of proof rests with the criminal defendant and not the state. This is not new law nor is it inconsistent with the precedent of this Court. See: Strickland v. Washington, 466 U.S. 668 (1984) (burden is on the criminal defendant to prove the existence of a Sixth Amendment violation in collateral review). Cuyler v. Sullivan, 446 U.S. 335 (1980) (prejudice on conflict claim is presumed only if defendant demonstrates that counsel "actively represented conflicting interests" and that the conflicting interests adversely affected his lawyers performance). The cases cited by the Petitioner as asserting no deference due on mixed questions

of law or fact do not support his actual position that the burden of proof in a habeas proceeding rests elsewhere than on the criminal defendant. In Chizen v. Hunter, 809 F.2d 560 (9th Cir. 1986), the court required the defendant "to overcome the strong presumption of verity accorded his statements" made during his plea before he was entitled to relief. 809 F.2d at 563. Similarly, in Glidewell v. Burden, 822 F.2d 1027 (11th Cir. 1986), the court affirmed in a habeas setting a conviction where the defendant failed in his burden to prove (or allege) facts to reveal prejudice by any delay in the prosecution. In Iaea v. Sunn, 800 F.2d 861 (9th Cir. 1986), the court remanded the matter for an evidentiary hearing on whether coercion existed that led to his plea, but was silent on who bore the burden of proof. Each of these cases do not reflect a conflict in the circuits or a disagreement on the approach of the lower court. Accord: U.S. ex rel. Cross v. DeRobertis, 811 F.2d 1008 (7th Cir. 1988); U.S. ex rel. Weathersby v. Chrans, 662 F.Supp. 940, aff'd., 873 F.2d 1444 (7th Cir. 1989); Alexander v. Duggar, 841 F.2d 371 (11th Cir. 1988); Martin v. Wainwright, supra, [781 F.2d 185 (11th Cir. 1985)]; Boles v. Foltz, 816 F.2d 1132 (6th Cir. 1987). Certiorari should be denied on this issue where the Court of Appeals and lower court properly allocated the burden of proof in the habeas proceeding.

2. The lower courts properly concluded that Petitioner's confession was not involuntary.

Petitioner asserts that the Court of Appeals erred in concluding that the confession at issue was voluntary as he asserts that the confession was a result of extended incommunicado interrogation, denial of his request for an attorney, and the failure of law enforcement officials to promptly present him to a judicial officer. The United States District Court found that Petitioner, already incarcerated at the Chester County Jail, was "street wise" and "no stranger to criminal activity". The Court found that the questioning process was not overbearing or oppressive, that there had been no threat of physical harm or reward, that Petitioner was questioned only sporadically and not at great lengths and was not questioned into the night or early morning hours. The Court determined that Petitioner was advised of his Miranda rights each time he was questioned and that Petitioner waived right to counsel and sought to cooperate with investigators to establish an alibi defense. The Court noted that, although Petitioner complained that he was denied medication for hemorrhoids, that he was being given the assistance by Officer Heath of his other requests. The Court noted Petitioner as articulate and possessing great recall of portions of the events and noting that other discrepancies may be due to lack of credibility. The Court also determined that

Petitioner was unaware of the prohibition against visitors or phone calls and that Petitioner never sought either. (APP. 706-718).

The voluntariness of Petitioner's confession was first raised during Petitioner's trial in the state court. Petitioner requested and was given a full evidentiary hearing out of the presence of the jury relative to the voluntariness of the confession and pursuant to Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). The two prosecution witnesses presented during the in camera hearing were Reid Long, a South Carolina Law Enforcement Division Officer, as well as Sheriff Orr. Long testified that on February 3, 1977, he advised Petitioner of his Miranda rights, specifically asked Petitioner if he desired appointed counsel and Petitioner rejected the offer of counsel and desired to talk to the officer without an attorney present. (APP. 126-128). Long testified that Petitioner first gave an oral statement in his presence and that of Sheriff Orr and later Captain Connor, Detective Heath, Chief Strait, and Barbara Griffin were called in to observe Petitioner again repeat his statement with Ms. Griffin taking the statement down. (APP. 128-130; 132-136). Petitioner appeared to Long to look healthy, made no complaints concerning health problems and gave a statement in the absence of threats or torture. (APP. 127, 132). After Petitioner gave the statement, Long and Detective

Heath transported Petitioner to the Chester County Clerk of Court's Office for appointment of counsel based upon the fact that Petitioner had implicated himself in the murder and even though Petitioner still had not requested counsel. (APP. 135-136).

Sheriff Orr, in addition to the same testimony offered by Long, testified that Petitioner was serving time in the Chester County stockade on an unrelated charge when he was arrested on January 29, 1977, with the present murder charge. Orr related that Petitioner was moved from the stockade to a cell designed for juvenile use in the same county jail. On the date after the warrant was served upon him, Petitioner signed a waiver of rights, and thus was made aware that he could speak to an attorney at any time. Orr testified that he talked to Petitioner on the date he was charged as well as at the time Petitioner gave the statement. Orr stated that Petitioner was fully advised of his rights on February 3rd prior to giving the statement and that after Petitioner signed the statement in the presence of the officers, he signed a receipt for it and was given a copy. Orr also testified that he was not aware of Petitioner having any medical problems at the time of the statement, although the Petitioner at some point thereafter was treated for a hemorrhoid condition. Orr related that, at his direction, a note was tacked on the wall on January 29, 1977, that Petitioner was to receive no visitors or have any telephone calls. (APP. 135-136).

The Petitioner testified during the hearing as well, stating that he was then twenty-two (22) years old, was serving time for another crime when he was arrested on January 29, 1977, and served with a warrant for the instant crime by Sheriff Orr. (APP. 278). Petitioner admitted that he had two previous housebreaking and grand larceny convictions as well as an armed robbery conviction. (APP. 280, 346, 347). Petitioner admitted that at that time he told Detective Heath that he was willing to answer questions and signed a waiver of rights form. Petitioner admitted that he read the waiver of rights form before signing it, but claimed that he did not understand that he could have an attorney appointed to represent him at that time. (APP. 284-285). Petitioner stated that he was then questioned for approximately thirty (30) minutes before being taken to a cell designed for one individual containing a bed, bath and shower, but no window. (APP. 286, 282, 288). Petitioner claimed that he was ill with hemorrhoids, that the cell was cold, and that he requested but never received medication for hemorrhoids. (APP. 283, 287, 291). However, Petitioner also admitted that he had been suffering from his hemorrhoidal condition from November 1976 until June of 1977, a number of months prior to the confession. (APP. 350, 352). Although Petitioner testified that he was next questioned on Sunday night (January 30, 1977) at 9:00 P.M. by Detective Heath, he later admitted that he asked

Detective Heath to investigate an alibi in his behalf. (APP. 288, 359). Petitioner stated that this questioning took place after he had been given supper, that it lasted for two hours, and that Detective Heath did not threaten him or make him any promises. (APP. 288-290). Petitioner related that he was unable to sleep that evening because he was cold, suffering from the hemorrhoidal condition, and because he was worried about the circumstances of his arrest. (APP. 290). Petitioner testified that he again talked to Heath, as well as Connor and Strait on Monday, January 31, 1977, at 9:00 A. M. and later was taken by them to Columbia, South Carolina, for a polygraph examination during that afternoon. (APP. 291, 295). Petitioner again admitted that he was receiving food but was having difficulty eating. (APP. 291). Petitioner also asserted that he requested from Heath medication for his hemorrhoidal condition on January 31, 1977. (APP. 292). Petitioner was informed by the polygraph operator that both the 1973 and 1977 polygraph results indicated knowledge of the crime. (APP. 299). Petitioner asserted that, upon his return from Columbia, South Carolina, on January 31, 1977, he was questioned by all three officers in Strait's office from approximately 3:30 P.M. until 7:30 P.M. (APP. 301-302). Again, Petitioner concurred that he was given food but had little appetite. (APP. 302). Petitioner also related difficulty in sleeping due to his hemorrhoids and testified

that he "always had pains from them, until I got the operation" which was not until June of 1977. (APP. 303, 350). Petitioner testified that he was questioned again on Tuesday, February 1. 1977, at approximately 9:00 A.M. by all three officers and that he asked to be moved to a different cell but was not moved. (APP. 304). Petitioner testified that on February 2, 1977, law enforcement officers presented to him Smoky Harris, the "snitch" who originally implicated Petitioner as the perpetrator of the offense. Petitioner testified that he and Mr. Harris had a face-to-face confrontation but that he received no threats from law enforcement officers and was questioned that day from 9:00 to 11:00 A.M. and again from 2:00 or 3:00 P.M. to 6:00 P.M. (APP. 305-307). Again Petitioner concurred that he was being properly fed. (APP. 307). It was February 3, 1977, that Petitioner claims that he first requested of Willie Heath assistance of counsel and the opportunity to call his brother. Also, Petitioner directed that Officer Heath "go talk to Buddy Grant" as a possible alibi. (APP. 309). Petitioner claimed that he did not give the statement until Friday, February 4, 1977, rather than February 3 and that he simply repeated what officers told him to say during the confession process. (APP. 311-315). Petitioner claimed that he signed the statement only because he was sick, needed help from a doctor and a lawyer, and was tired of being locked-up. (APP. 314). However, Petitioner conceded

that he did not talk to his lawyer until February 7 and admitted that he did not receive medication for hemorrhoids until February 11 and received no surgery until June. (APP. 323, 350). Petitioner also conceded that he did not request to call his brother until one day after the statement was given. He further admitted that he requested that Officer Heath investigate two potential alibis in his behalf. (APP. 324, 359, 361). (See also APP. 137-157).

At the conclusion of the in camera hearing, the state court found that the court was

> ...Dealing here with a factual situation. And I have to resolve the facts in order to make this ruling at this point. Facts, of course, are finally for the jury. I conclude that the statement is admissible in evidence. I find that, from the facts beyound a reasonable doubt, the statement was freely and voluntarily given. (APP. 198).

The same witnesses testified before the jury basically as related above. Also presented by the prosecution in reply was the testimony of Officer Willie Heath who related that on Sunday, January 30, 1977, he was called to the jail by Petitioner and investigated a possible alibi at Petitioner's direction. (APP. 367). He testified that he met with Petitioner at approximately 3:30 P.M. on that day, that Petitioner never complained of pain or requested medication and "seemed to be in good humor". (APP. 368, 371). Shortly after Petitioner's request to Heath, Heath investigated a potential alibi and returned to the jail to report his

findings to Petitioner as well as to deliver cigarettes he had purchased at Petitioner's request. (APP. 372). Heath testified that he gave Petitioner no promises and that Petitioner never asked for an attorney. (APP. 372, 384). Further, Heath testified that he was called in to witness Petitioner's signature to the confession and was present and heard Petitioner give the confession to the secretary. (APP. 372). Heath denied that he talked to Appellant the morning of February 3 prior to Petitioner's statement and also denied that Petitioner ever requested of him an attorney. (APP. 388, 384). Heath, along with Long, transported Petitioner to the Clerk of Court's Office for appointment of counsel shortly after Appellant's confession and because Petitioner had implicated himself in a murder. (APP. 387, 385). Heath testified that Petitioner never asked him for medication or said he was suffering from discomfort. (APP. 608).

Also, Mrs. Barbara Griffin testified that Petitioner gave his statement orally and she took it down in shorthand. (APP. 394). She testified that she typed Petitioner's statement, read the statement back to him and Petitioner signed it. (APP. 395). She also related that Petitioner made one correction to the statement. (APP. 396). Further, Griffin testified that Long and Heath asked Petitioner if he wanted an attorney present and Petitioner declined and insisted upon making a statement. (APP. 398).

Further, the Clerk of Court testified that Petitioner was first appointed counsel on February 3, 1977 and was later appointed second counsel on February 4, 1977. (APP. 413).

During the federal evidentiary hearing before United States Magistrate Carr, Sheriff Orr testified that, although he had been Sheriff for only twenty-five (25) days at Petitioner's arrest, he had been Magistrate for ten (10) years prior thereto. (APP. 452). Based upon information provided by informant, Smoky Harris, Orr testified that an arrest warrant was obtained for Petitioner and served upon him by Orr, while Petitioner was in the Chester County facility. (APP. 453). Orr related that he read to Petitioner the Miranda warnings, that Petitioner indicated that he understood those rights, and declined counsel. (APP. 454). Orr related that Petitioner appeared normal and without pain or difficulty in movement. (APP. 457). Orr described the youth cell which held Petitioner from January 29 to February 3, 1977 as a front cell near the jailer's office containing a bunk, commode, shower, sink, table with stool, and bench. The cell also has one window in the cell door. (APP. 458). He related that the temperature in 1977 was regulated at 65 degrees by Presidential Order and that additional blankets were provided. (APP. 458-459). Petitioner was held in the juvenile cell to prevent conversation or confrontation with Smoky Harris who had signed a statement against Petitioner. (APP. 400). The

Sheriff admitted posting a prohibition against calls or visitors for Petitioner and that the prohibition was to last only through the weekend but inadvertently remained visible for a longer period of time. (APP. 460). Orr stated that Petitioner did not request medical attention, an attorney, or family visits and that the first call made by Petitioner was on February 4 to his brother. (APP. 461-462). Further, medical log entries reveal that Petitioner did not request medication until February 11 and received a mild laxative at that time. (APP. 466). Orr also related that ministers and attorneys are always permitted as visitors regardless of any posted prohibitions. (APP. 468). The Sheriff was unaware of any request by Petitioner for visitors or permission to use the telephone. (APP. 469). Orr's next contact with Petitioner was February 3, 1977. Orr confirmed that Petitioner was advised of his Miranda rights and offered an attorney but Petitioner declined said offer. (APP. 471). Orr related, in addition to what he previously testified to at trial, that Petitioner first asserted right to counsel on February 4, 1977, (APP. 477), and that he first learned of the complaints Petitioner raises herein on February 12, 1977 when Petitioner appeared with counsel. (APP. 479). Orr related that, at the time of the confession, Petitioner was not handcuffed and that Petitioner could not see the notice prohibiting visitors and calls. (APP. 487, 492). In fact, Petitioner's first telephone call was made at a time when the note was still posted. (APP. 492).

Reid Long also testified again at the evidentiary hearing and related his giving of Miranda to Petitioner. (APP. 512). Long denied that Petitioner requested counsel, medication, contact with family or other prisoners. He testified that Petitioner first invoked right to counsel on February 4, 1977, subsequent to his brother's visit. (APP. 85-91). Petitioner also exhibited to Long the ability to read and write. (APP. 512). Long related that the focus of the investigation up to the point of Petitioner's confession was that of mere exploration. This is confirmed by the officers' willingness and cooperation in attempting to verify Petitioner's alibis. (APP. 519).

The jailer, Johnny Dawkins, testified that any defendant who requested an attorney received one and that he recalled no request by Petitioner for an attorney or pain medication. (APP. 110).

Chief Strait testified that on the January 31, 1977, trip to Columbia, South Carolina, Petitioner was not interrogated and was not questioned by him upon return to Chester. (APP. 457, 458). He also testified that, at the confession, Petitioner presented no complaints or requests. (APP. 549).

Barbara Griffin testified as she had previously at trial as did Willie Heath with a few exceptions. Heath testified additionally that he knew Petitioner's family but Petitioner requested that he not contact them. (APP. 567).

Heath related that he saw Petitioner on January 30, 1977 and the morning of January 31, 1977, at Petitioner's request that he investigate potential alibi leads. (APP. 563-569). Heath also travelled with Petitioner to Columbia, South Carolina, but did not see him again until February 3, 1977. Although Heath testified that Petitioner did not request counsel, calls, medical assistance or a warmer cell, on cross-examination as to his memory and specific recollection, he testified "I don't think he asked me for a lawyer." (APP. 581). Heath related that, up to the confession, he was merely involved in Petitioner's case to investigate potential alibis for Petitioner and saw Petitioner only at Petitioner's request. (APP. 575-578, 161). Also on cross-examination, Heath testified again that Petitioner did not request an attorney on the morning of February 3, 1977. (APP. 588).

Petitioner offered virtually the same testimony presented during the trial with certain exceptions. Petitioner complained that he was not given access to television, books, or magazines but never stated that he requested same. (APP. 616). New to the federal proceeding was Petitioner's testimony that, when he was taken out of the cell prior to the confession, he was under the impression that he was going to see an attorney. (APP. 631). He also testified that he knew what Smoky Harris had previously informed the officers so he knew what to put in

the confession. (APP. 634). Petitioner admitted that, "Well, yes, I was caught" and that he was not receiving the treatment he expected. (APP. 635). He also testified that the contents of the confession were based upon what he had read and heard on the street. (APP. 635). Petitioner further testified that, after his confession, he met Sheriff Orr and the officers in the hallway and requested that he be moved out of the juvenile cell and was, in fact, moved to the maximum security portion of the jail. (APP. 638). Petitioner further related his prior record and experience in the criminal justice system as well as the number of times he had been represented by counsel and given confessions. (APP. 641-643). He also testified that he confessed, not because he was tired and cold and wanted to resolve the situation, (See contra; trial testimony) but because he did not understand that he had the right to request an attorney and to stop questioning. (APP. 652-653).

The test for the voluntariness of a confession is whether the confession was the product of a free and unconstrained choice. If a criminal defendant's will is overborne, use of the resulting confession offends due process. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). There must be a determination made of whether police conduct was oppressive or coercive. "Absent police conduct causally related to the confession, there is simply no basis for

concluding that any state actor has deprived a criminal defendant of due process of law." Colorado v. Connelly, 479 U.S. 157 (1986). In determining whether a criminal defendant's will was overborne, it is important to make the assessment based upon the totality of the circumstances, both that of the defendant and of the details of interrogation. Schneckloth v. Bustamonte, supra; Colorado v. Connelly, supra. See also Miller v. Fenton, supra; U.S. v. Carroll, 710 F.2d 164 (4th Cir. 1983). Important factors for careful consideration include the defendant's education, youth, low intelligence, and receipt of Miranda warnings. Id. Other factors also include repeated questioning by police, Smallwood v. Warden, 367 F.2d 945 (4th Cir. 1966); relay questioning, Ashcraft v. Tennessee, 322 U.S. 143 (1944); and prolonged questioning, Michigan v. Moseley, 423 U.S. 96 (1975). Further factors include physical or mental abuse, Greenwald v. Wisconsin, 390 U.S. 519 (1968), and the mental condition of the defendant. Colorado v. Connelly, supra. Delay in time before appearance before a judicial officer, U. S. v. Carroll, supra; Ferguson v. Boyd, 566 F.2d 873 (4th Cir. 1988), and being held incommunicado are additional factors. Thomas v. State of North Carolina,, 447 F.2d 1320 (4th Cir. 1971); Williams v. Peyton, 404 F.2d 528 (4th Cir. 1968); Darwin v. Connecticut, 391 U.S. 346 (1968); Reck v. Pate, 367 U.S. 433 (1961); Rogers v. Richmond, 365 U.S. 534 (1961). However, "none of these factors is to be

considered in isolation, nor may the determination rest on any one circumstance. U.S. v. Wertz, 625 F.2d 1128 (4th Cir. 1980).

The evidence in this case and the Court of Appeals conclusions reveals that Petitioner presented himself at the time of his confession, as a mentally stable twenty-one (21) year old with a tenth grade education, and an extensive criminal record. Petitioner had previously given confessions and was previously represented by counsel on unrelated charges and convictions. Petitioner was an intelligent and knowledgeable individual who was familiar with police practice and procedure, including the confession process and utility of representation by counsel. Unlike the case of Davis v. North Carolina, 384 U.S. 737 (1966), Petitioner was not a mental deficient who was held for sixteen (16) days incommunicado with barely adequate nourishment. Petitioner was familiar with his surroundings and was not disoriented or frightened.

The evidence also reveals that the questioning process was not overbearing or oppressive. There was no threat of or physical harm done to Petitioner by law enforcement or evidence of promise of reward or immunity in exchange for a confession. Unlike Darwin v. Connecticut, 391 U.S. 346 (1968), Petitioner was not questioned for six to seven hours per day. Officers were also unaware of physical discomfort, if any, suffered by Petitioner and indicated that Petitioner appeared alert. In fact, the

State's witnesses support the conclusion that Petitioner was questioned sporadically and not at great length. Petitioner was transported to another city for a polygraph examination during which he was again advised of his rights and not questioned at all during the trip. Although Petitioner was retained in the juvenile cell located in the Chester County Jail in order to avoid the confrontation between Petitioner and another inmate "snitch", Petitioner admitted that he could hear the comings and goings of the Chester County Jail, that he was removed from the cell to other locations in the jail for questioning and that he never requested reading material, calls, or visitors. Petitioner was unaware of efforts of his brother to see him or of the posted prohibition of visitors or calls. Events occurring outside Petitioner's presence and unknown to him are without merit to reveal his mental state. Moran v. Burbine, 475 U.S. 412 (1986). During questioning, Petitioner appeared normal and indicated a general willingness to talk to investigating officers. In fact, the witnesses offered by the State support the conclusion that Petitioner never requested counsel and repeatedly summoned an officer who was a friend of the family to request that the officer make efforts to investigate various alibi possibilities which he offered, See U. S. v. Hart, 619 F.2d 325 (4th Cir. 1980), and of whom Petitioner requested that his family not be notified. Although an order of the Sheriff denying

Petitioner visitors over the weekend was inadvertently posted for a longer period than intended, the testimony reveals that an attorney could have seen Petitioner at any time regardless of the order and that the jailer would have contacted an attorney upon Petitioner's request. Further, there was no threat from the State that release from the juvenile cell, medication, medical treatment, counsel, or visitors would be withheld until Petitioner gave a confession. In fact, the State's witnesses clearly support the conclusion that Petitioner never requested any of the above and none were a factor in Petitioner's confession. Petitioner was not the victim of prolonged questioning as the composition of the confession reveals. Petitioner was not worn down by improper interrogation tactics and was repeatedly given Miranda warnings. The law enforcement officers certainly never intimidated nor threatened Petitioner. In fact, Petitioner initiated and consented to continued meetings with law enforcement officers in hopes of establishing some alibi, and, thereafter, voluntarily confessed.

Although some days passed before Petitioner was taken to a judicial officer, this is but one factor to take into consideration in determining the voluntariness of the confession. Herein, there were no uninterrupted periods of interrogation and the delay was not a result of exploitation but for investigation in Petitioner's behalf.

Respondents submit that the confession was freely and voluntarily entered and that the lower courts' conclusions are correct and supported by the record. His requests for certiorari relief are without merit and must be denied.

CONCLUSION

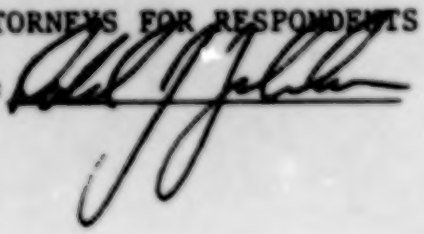
For all the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

ATTORNEYS FOR RESPONDENTS

By: 

March 1, 1990
Columbia, South Carolina

IN THE SUPREME COURT
OF THE UNITED STATES

No. 89-6126

RAY CHARLES DEGRAFFENREID,

PETITIONER,

vs.

KENNETH D. MCKELLER, WARDEN, KCI, WILLIAM D. LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, T. TRAVIS MEDLOCK, ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA,

RESPONDENTS.

AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and ten copies of Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in the above captioned case by depositing same with Federal Express, and properly addressed to the Clerk of this Court.

This 1st day of March, 1990.

Donald J. Zelenka

SWORN to before me this

1st day of March, 1990.

(LS)
Notary Public for South Carolina
My Commission Expires: June 10, 1997

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RESPONDENTS.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit on the Petitioner by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to John F. Hardaway, Esquire, 1405 Gregg Street, Columbia, South Carolina 29201. He further certifies that all parties required to be served have been served.

This 1st day of March, 1990.

Donald J. Zelenka

SWORN to before me this

1st day of March, 1990.

(LS)
Notary Public for South Carolina
My Commission Expires: June 10, 1997